

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLAUDIA BARBER,)	
)	CASE NO. C11-1790-RSL-MAT
Plaintiff,)	
)	
v.)	
)	REPORT AND RECOMMENDATION
MICHAEL J. ASTRUE, Commissioner)	RE: SOCIAL SECURITY
of Social Security,)	DISABILITY APPEAL
)	
Defendant.)	
_____)	

Plaintiff Claudia Barber proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

///

///

///

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1951.¹ She completed high school and previously worked as a laborer and janitor. (AR 98-107.)

Plaintiff filed an application for DIB on April 13, 2006, alleging a disability onset date of February 11, 2004. (AR 108.) The application was, initially and on reconsideration, granted in part as to the time period after Plaintiff's 55th birthday on June 4, 2006, but denied for the period between the alleged onset date and June 4, 2006. (AR 41-42, 45-46.) Plaintiff timely requested a hearing. (AR 41.)

On November 20, 2007, ALJ Verrell Dethloff held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 271-93.) On March 3, 2008, the ALJ issued a decision finding Plaintiff not disabled prior to her 55th birthday. (AR 11-21.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on May 20, 2009 (AR 4-6), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

The Commissioner conceded that the case needed to be remanded for further proceedings. (AR 319-35.) In his Report and Recommendation, U.S. Magistrate Judge Brian Tsuchida agreed with the Commissioner that the outstanding unresolved issues required remand for further proceedings, particularly because neither the conceded errors nor the errors identified by Plaintiff would compel a finding of disability. (AR 312-318.) Judge Tsuchida

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 recommended that the ALJ be directed to:

02 (1) update the record by obtaining the April 3, 2006, independent medical
03 examination (IME) report from Dr. Green and the physical capacity evaluation
04 prepared by Dr. Castle on December 7, 2004; (2) reevaluate and further
05 develop the medical evidence in the record; (3) reevaluate Dr. Welch's
06 opinion; (4) reevaluate steps two and three of the sequential evaluation
07 process; (5) reevaluate plaintiff's credibility; ([6]) reevaluate plaintiff's RFC;
08 and ([7]) reevaluate steps four and five of the sequential evaluation process
09 with the assistance of a vocational expert.

07 (AR 318.) U.S. District Judge Richard Jones approved and adopted Judge Tsuchida's Report
08 and Recommendation. (AR 336-37.)

09 The Appeals Council thereafter ordered the ALJ to conduct further proceedings
10 consistent with the District Court's order. (AR 340-41.) On remand, the ALJ misunderstood
11 the scope of review ordered by the District Court, describing the District Court's order as
12 requiring the evaluation of the reports of Drs. Green and Castle, but otherwise "affirming the
13 entire[t]y of the prior ALJ decision." (AR 297.) The ALJ specifically indicated that he
14 believed the District Court had affirmed his findings that Plaintiff was not credible, even
15 though the District Court had actually instructed the ALJ to reconsider the adverse credibility
16 findings. (*Compare* AR 297 with AR 334.) As a result of that misunderstanding, the ALJ did
17 not reassess Plaintiff's credibility or reevaluate Dr. Welch's opinion, or reassess any of the
18 other findings as instructed by the District Court. The ALJ conducted a brief second hearing
19 on June 23, 2011, at which Plaintiff (but not a vocational expert) testified. (AR 382-88.) On
20 June 28, 2011, the ALJ again found Plaintiff not disabled during the relevant period. (AR
21 297-311.) This appeal followed.

22 ///

01 **JURISDICTION**

02 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §
03 405(g).

04 **DISCUSSION**

05 The parties agree that the ALJ's second decision is erroneous because it does not
06 comply with the District Court's remand order. The sole issue presented in this appeal — as
07 was the situation when Judge Tsuchida previously considered this case — is whether the
08 remand should involve further administrative proceedings, or should direct payment of
09 benefits.

10 In her opening brief, Plaintiff contends that the ALJ erred at step two by not finding
11 Plaintiff's myofascial pain syndrome to be severe, and erred by discrediting Plaintiff's
12 testimony and Dr. Welch's opinions. The Commissioner agrees that the ALJ should be
13 instructed to consider the seven issues identified in Judge Tsuchida's Report and
14 Recommendation, which include a reassessment of Plaintiff's credibility and Dr. Welch's
15 opinions, and a reconsideration of the findings at steps two through five. In her Reply Brief,
16 Plaintiff restates her arguments that the ALJ improperly discounted her credibility and erred
17 in evaluating Dr. Welch's opinions, without explaining why the remedy proposed by the
18 Commissioner — the ALJ's reassessment of, *inter alia*, Plaintiff's credibility and Dr. Welch's
19 opinions on remand — would be inadequate.

20 Plaintiff also argues in her Reply Brief that the ALJ erred in failing to address some
21 limitations identified by Dr. Becker, and the Commissioner agreed in his brief in the previous
22 case that the ALJ would need to reconsider his RFC assessment and step-five findings in light

01 of Dr. Becker's opinions and the other new medical opinions. (AR at 325-26.) Though the
02 Commissioner again concedes here that the ALJ should, on remand, reconsider his RFC
03 assessment and his findings at steps two through five, Plaintiff argues that the Commissioner
04 should not receive "a second bite at the apple" and that this Court should instead simply credit
05 as true the opinions that were erroneously discredited and remand for payment of benefits.
06 (Dkt. 19 at 1, 4.)

07 For the same reasons previously identified by Judge Tsuchida, remand for payment of
08 benefits is not appropriate here because there remain outstanding issues that must be resolved
09 before a disability determination can be made. Remand for payment of benefits is appropriate
10 if:

11 (1) the ALJ failed to provide legally sufficient reasons for rejecting the
12 evidence; (2) there are no outstanding issues that must be resolved before a
13 determination of disability can be made; and (3) it is clear from the record that
the ALJ would be required to find the claimant disabled were such evidence
credited.

14 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). The parties agree that the first
15 component is present here, but Judge Tsuchida previously identified outstanding issues to be
16 resolved on remand, and explained why the discredited evidence would not compel a finding
17 of disability even if it were credited:

18 Here, the Court concludes the appropriate judicial response is to remand the
19 case for further administrative proceedings. First, the errors to which the
20 Commissioner admits — the ALJ's failure to include Dr. Green's IME and Dr.
21 Castle's report and include in his RFC determination Dr. Becker's opinion that
22 plaintiff had limited grasping and lifting ability — do not compel a finding of
disability. At this point, it is not known what opinions are contained in the
missing reports or what impact Dr. Becker's opinions would have on plaintiff's
RFC.

01 Second, even if the Court accepts plaintiff's contention that the ALJ erred in
02 discounting her credibility, and credited plaintiff's "pain testimony" as true,
03 the Court cannot say the ALJ would be required to find her disabled. This is
04 because it is unclear whether plaintiff's "pain" itself or in combination with
05 other conditions renders plaintiff disabled. Dr. Welch, plaintiff's treating
06 doctor, opined "[b]ut for the effects of the pre-existing cognitive condition, the
07 claim related condition is not sufficient to permanently totally disable the
08 worker from full time gainful employment . . . However, when the claim
09 related condition is combined with the pre-existing condition, the worker is
10 rendered totally disabled." The Court will not jump to any conclusions about
11 whether plaintiff's "pain" is part of her cognitive condition or what role "pain"
12 plays in Dr. Welch's opinion where the doctor did not make that clear.
13 Accordingly, the Court views this as an unresolved, or at least unclear, issue
14 that should be resolved before a determination of disability can be made.

15 Third, plaintiff argues the ALJ erred in rejecting Dr. Welch's opinion that she
16 is disabled. However, the ALJ's evaluation of Dr. Welch is not as open and
17 shut as plaintiff claims. A treating physician's opinion is entitled to special
18 weight. *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1981) But, a treating
19 physician's opinion is not necessarily "conclusive as to either a physical
20 condition or the ultimate issue of disability," *Magallanes v. Bowen*, 881 F.2d
21 747, 751 (9th Cir.1989), and may be rejected if contradicted by another doctor's
22 opinion and the ALJ gives "specific and legitimate reasons" for doing so that
"are supported by substantial evidence" in the record. *Bayliss v. Barnhart*, 427
F.3d 1211, 1216 (9th Cir. 2005).

Here, Dr. Welch found plaintiff had physical limitations to her shoulder, right
extremity and problems with her back and ankle. The ALJ's determination that
these findings are not supported by objective findings is at odds with the
undisputed fact that plaintiff fell 20 feet, shattered her right forearm and
shoulder, required surgical repair and has significant disc herniation at T10-11
as shown through an MRI. It is also contrary to the other medical evidence in
the record which indicate that plaintiff's upper extremity conditions prevent
her from performing any past relevant work and limit her RFC. This error,
however, does not mandate an award of benefits because Dr. Welch opined
that these conditions alone – the "claim related conditions" – do not render
plaintiff totally disabled.

Rather, Dr. Welch opined plaintiff's "cognitive condition" combined with her
other conditions rendered her disabled. He did not, however, explain what
these cognitive conditions were and why he thought they disabled plaintiff. An
ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory
and inadequately supported by clinical findings. *Tonapetyan v. Halter*, 242

01 F.3d 1144, 1149 (9th Cir. 2001). Here the ALJ acknowledged plaintiff had
02 cognitive limitations, including borderline intelligence, concentration problems
03 and pain, but concluded that she still had the capacity to perform simple,
04 repetitive tasks. This conclusion may change, of course, after the ALJ, on
05 remand, reevaluates steps two through five, considers additional evidence and
reevaluates the medical sources, plaintiff's RFC and plaintiff's credibility.
Accordingly, the Court finds there are still outstanding issues as to Dr. Welch's
opinion that must be resolved before a determination of disability can be made.

06 In sum, the case should be remanded for further administrative proceedings.
07 The Court recommends the ALJ be directed to reevaluate all of the medical
08 evidence and plaintiff's credibility. The ALJ should (1) update the record by
09 obtaining the April 3, 2006, independent medical examination (IME) report
10 from Dr. Green and the physical capacity evaluation prepared by Dr. Castle on
December 7, 2004; (2) reevaluate and further develop the medical evidence in
the record; (3) reevaluate Dr. Welch's opinion; (4) reevaluate steps two and
three of the sequential evaluation process; (5) reevaluate plaintiff's credibility;
(5) reevaluate plaintiff's RFC; and (6) reevaluate steps four and five of the
sequential evaluation process with the assistance of a vocational expert.

11 (AR at 316-18 (internal citations to previous administrative record omitted).) The Plaintiff
12 has not provided any argument to dispute that reasoning, and makes no attempt to show that
13 remand for further proceedings would serve no useful purpose. *See McCartey v. Massanari*,
14 298 F.3d 1072, 1076 (9th Cir. 2002) ("We may direct an award of benefits if the record has
15 been fully developed and further administrative proceedings would serve no useful
16 purpose."). The ALJ's failure to apprehend the accurate scope of review on remand the first
17 time should not, by itself, preclude a second remand for further administrative proceedings.

18 Plaintiff goes on to argue, however, that if this case is remanded for further
19 administrative proceedings, it should be assigned to a different ALJ because this ALJ failed to
20 follow the instructions of the District Court on the first remand. (Dkt. 12 at 4.) Remand to a
21 new ALJ is appropriate where the circumstances suggest that an ALJ's impartiality is
22 compromised. *See Miles v. Chater*, 84 F.3d 1397, 1401 (11th Cir. 1996). Factors indicating

01 that a new ALJ should be assigned on remand include:

02 (1) a clear indication that the ALJ will not apply the appropriate legal
03 standard on remand; (2) a clearly manifested bias or inappropriate hostility
04 toward any party; (3) a clearly apparent refusal to consider portions of the
05 testimony or evidence favorable to a party, due to apparent hostility to that
06 party; (4) a refusal to weigh or consider evidence with impartiality, due to
07 apparent hostility to any party.

08 *Lilienthal v. Astrue*, 2010 WL 474692, at *6 (W.D. Wash. Feb. 1, 2010) (citing *Sutherland v.*
09 *Barnhart*, 322 F.Supp.2d 282 (E.D.N.Y. 2004)). Plaintiff does not address these factors, and
10 the Court finds none of them applicable here. The ALJ's misapprehension of the scope of the
11 first remand does not amount to clear evidence that he would not apply the correct legal
12 standard on the second remand, and the record does not evince the ALJ's apparent bias or
13 hostility to any party. Because there is no evidence that the ALJ's impartiality has been
14 compromised, the Plaintiff has not shown that assignment to a different ALJ is necessary.

13 CONCLUSION

14 For the reasons set forth above, this matter should be REMANDED for further
15 administrative proceedings, instructing the ALJ to address the following issues: (1) reconsider
16 Dr. Green's April 3, 2006 IME report and Dr. Castle's December 7, 2004 physical capacity
17 evaluation; (2) reevaluate and further develop the medical evidence in the record; (3)
18 reevaluate Dr. Welch's opinions; (4) reevaluate steps two and three of the sequential
19 evaluation process; (5) reevaluate Plaintiff's credibility; (6) reevaluate Plaintiff's RFC; and
20 (7) reevaluate steps four and five of the sequential evaluation process with the assistance of a
21 vocational expert.

22 ///

01 DATED this 9th day of August, 2012.

02 

03 Mary Alice Theiler
04 United States Magistrate Judge